IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 289

SOUTHERN STEAMSHIP COMPANY, *Petitioner*,

v.

C. M. MEYNERS, *Respondent*

OPPOSING BRIEF OF RESPONDENT, C. M. MEYNERS, To Petition for Certiorari and Brief Supporting Same

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TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now C. M. Meyners, Respondent, and respectfully files this his brief opposing the petition for certiorari and brief supporting same:

Report of Opinion by Court Below

No opinion was rendered by the Trial Judge.

Jurisdiction

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was entered on March 20, 1940 (R. 595). The Petitioner in due time filed a petition for rehearing on April 24, 1940 (R. 602), which petition was denied on May 22, 1940 (R. 624).

The Petitioner relies upon the provisions of Sec. 240(a) of the JUDICIAL CODE as amended by Act of February 13, 1925, 229, 43 Stat. 938 (28 U.S.C.A., Sec. 347 (a)), for authority for the Writ of Certiorari.

Petitioner, as grounds for the writ, claims the Circuit Court of Appeals erred in holding (as did the trial court) that the operator of the crane was, as a matter of law, an employee of the Petitioner.

Petitioner attempts to secure the writ on the theory that the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions (Sup. Ct. Rule 38, Sec. 5(a), (see page 8 of the Petition, Reasons for Granting Petition).

It is claimed by Respondent that the Circuit Court of Appeals' judgment is not in conflict with SMITH BROS., INC., v. O'BRYAN, as claimed by Petitioner but that it follows it, and that is not in conflict with the latest decision of the highest appellate court of Texas, the appropriate State court, but follows it. Despite the "Grounds" stated by Petitioner, it is merely seeking to secure a writ of certiorari on a question of sufficiency of evidence which has been decided by the two lower courts against it.

Statement of the Case

The Summary and Statement of Matter Involved, in the Petition for the Writ of Certiorari of Petitioner give, in general, the facts in the case and the matters involved. Except as to the matters herein stated to be incorrect or incomplete, it is adopted as part of this statement.

Petitioner, at the top of page 2 of such Petition, states that Respondent was struck by the wheels of a moving crane. This is incomplete. The Respondent had one leg cut off by the wheels of the crane and the other badly mangled (R., bottom 107, 111, 112). He hung for about an hour and forty-five minutes by the leg that was not cut off, head down, before he could be released (R. 108).

On page 2, lines 22 to 24 of the Petition, it is stated that the Navigation District rented the wharf and crane to various users under the terms of tariffs which had been promulgated. On page 3 of the Petition, it is stated that the crane and pier were not continuously or exclusively used by the Petitioner. This is not correct. It is further stated that the same were subject to be used by any other party in accordance with the tariff. These statements are not complete and leave an erroneous impression. The facts were that, so far as the tariff provisions were concerned, there was nothing to prevent the Navigation District, through its agent the Port Commission, from letting others use the wharf and crane (R. 290); but as a practical matter, the Steamship Company had the exclusive possession and use of the portion of Dock No. 4 in question (R. 280, 11, 1-5; 290, 11, 1-19) for about eleven years before the accident (R. 284). It had an incoming and an outgoing ship a week and the dock was vacant a day or two a week (R. 291,11, 1-20). The crane could not be moved to other wharfs (R. 292). The wharf and crane could not have been made available to others without the consent of the Steamship Company unless time were taken to install a new electric switch and meter (R., bottom 292, 293,11, 1-32). Such meter belonged to the Steamship Company, and had for about eight years before the accident (R. 293, 11, 9-15). It was admitted that the electric current was controlled through a switch in the control and custody of the Steamship Company (R., middle 458). It was under its lock (R., bottom 458, top 459).

The Steamship Company paid directly (to the power company) for the electric current (R. 284). Only on one or two occasions had this wharf been used by anyone else than the Steamship Company and then with the latter's permission (R. 293). The Steamship Company had taken over under the contract and had stayed there ever since (R., bottom 290); there were other navigation hoists available (R. 292, 469, 482), though this was the only overhead crane the district had (R. 292) there were other terminals, private ones, besides the Navigation District's (R. 471).

On page three of the application, it is stated that the user of the crane was obliged to accept the operator employed by and furnished by the Navigation District and the user was without power to hire or use another or to discharge him. This is erroneous and leaves the wrong impression. The tariff provided for the cost of the crane with operator. There was no provision that the steamship company could not hire an operator of its choice (R. 282). The tariff provided "charge for operators of freight handling machinery will be made by the Port Commission, but it is expressly understood that the Port Commission acts solely as the agent of the User in engaging operators and paying them for their services. The operator, as well as the freight handling machinery, is turned over to user and is under user's supervision and control * * *" (R. 280 offered 277). In fact, the steamship company insisted that only this particular operator operate the crane and told the district it would have to keep him (R. 508). If the steamship company had called the Navigation District's representatives and insisted upon selecting its own operator, they could have done so (R. 523). The Navigation District for years attempted to put an auxiliary operator on the crane for relief purposes but this had been opposed by and prevented by petitioner (R. 523, 508). On two occasions the Navigation District had sent over other operators. They were less experienced than the operator

in question. The steamship company had this practice discontinued and insisted that only he, Billy Leonard, operate the crane for them (R. 508). The Steamship Company did not want to run the chance, because of any slowness of the operator of the crane, of losing time (R. first half 524).

At the top of page four of the petition, it is stated that the crane operator's wages for operating the crane were paid by the Navigation District. This is incomplete and leaves an erroneous impression. The Navigation District did make the actual delivery to Leonard, but in doing so, it was acting for the steamship company who actually paid such wages (R. 283). Item 810 of the Tariff provided that the steamship company should pay the operator's wage (R. 280, offered top 277). Item 870 of the Tariff provided the rate of the operator's pay (R. 282, offered top 277). It was undisputed that the steamship company did pay it (R. 283, bottom 308). This wage was more than the operator's wage when working for the Navigation District (R. 305-306).

In the third sentence of the third paragraph on page four of the petition, it is stated that the cargo of pipes was unloaded from the ship by her own tackle. This is incomplete, in that it is not clearly stated that this was the steamship company's work and done by it under its own direction and as part of the operation of moving the pipes from the ship to the cars, in which operation the crane operator was engaged at the time of the accident in question. All this was being done directly by the Steamship Company itself (R. 454). The crane operator was doing the Steamship Company's work (R. 453). From the unloading of the boat to the placing of the freight in the cars, all was done under the supervision of the Steamship Company's assistant superintendent (R. 462, 434).

In the fourth sentence of the third paragraph on page four of the petition, it is stated that the sling was placed around the bundles of pipe "without signal." This is incomplete and

leaves the wrong impression. It is immaterial also, as such operation was performed by other employees than the crane operator. The movement of the crane operator in placing the crane where the slings from it could be placed around the bundles of pipe and the selection of the particular bundle of pipe to be next handled was controlled by signals of Petitioner's sub-boss given the crane operator (R. 434, 453, 436, 462, 463, 350, 324, 325, bottom 374, 385, 394, 398, top 407, 408).

On page five of the petition, it is stated that the operator faced towards the ship with his back to the warehouse towards which at times the crane moved. This is not correct. It is not material to the point before this Court. The operator had his back to the side wall of the warehouse behind him. The operator's cab on the day of the accident in question was completely open on three sides, that is, the front facing out into the warehouse and the two sides, so that the operator faced out into the shed towards the opposite side from the one on which his cab was. He could either look towards the shed or turn his head and look towards the ship or turn it the other way and look towards the cars (R. 445, 198, 199, 215, 404, 116, Exhibit 5 offered and appearing 117, 174). The track upon which Respondent, plaintiff below, was when hurt was in the operator's plain unobstructed view (R. 174, 176, bottom 198, 199, 201, 103, 104, 105, 117). There was no contention that even the cardboard or board windshield shown in the photographs was there at the time of the accident in question. This was only for use in winter to cut off the cold air (R. bottom 516).

In the last sentence in the third paragraph on the fifth page of the petition, it is stated that the workmen went up at 8:00 A. M., and stayed until noon and were supposed to remain there during that time except when it was absolutely essential for them to come down. This statement is partly erroneous and is misleading. The part of the record cited by Petitioner in this

connection shows that Meyners kept the painters up all morning unless "something unusual came up." There is nothing in the record to indicate that they were supposed to remain up there so far as the Petitioner is concerned. Likewise, there is nothing in the record to indicate that Meyners was to stay up there or did stay up there. In fact, he came down frequently. He did this every time it was necessary, as was his duty, to mix a bucket of paint for any of the painters working above (R. bottom 152, bottom 162).

In the second sentence in the last paragraph on page five of the petition, it is stated that Meyners went on to the rail beam without advising the operator of the crane or any of the other employees of his intentions so to do. This is not correct and leaves the wrong impression. It is not claimed that Meyners told the operator immediately upon his going on the beam but he had told him before. Before starting the paint job, Meyners went to his superior, the general maintenance engineer of the Navigation District, and told him that it was a dangerous job. Such superior told him to go tell the crane operator and that "he will surely look out for you" (R., bottom 166). Meyners did this and the crane operator promised him that he would look out for Meyners and the other men (R. top 167, middle 162, bottom 105, top 106). It was necessary for Meyners to use the method of going up that he did (R. 98, 99, 194, 206). The operator of the crane himself went up and down the same way when going to his cab (R. 206). He frequently went up and down with the painters (R. 206, 220) and saw them going to and from the place of work (R., bottom 234, top 235). It was too noisy to count on yelling or whistling at the operator (R. 513, 161). The assistant superintendent of Petitioner, under whom the crane operator was working, knew the painters were working up there on the day of the accident and before (R. 450, top 451). Likewise and for the same reasons the statements made in the first four paragraphs on page 13 of Petitioner's brief are erroneous and misleading.

ARGUMENT

Points in Opposition to the Petition

1.

The only question that Petitioner seeks to bring before this Court is that of sufficiency of the evidence to support the holding by the Circuit Court of Appeals, that the crane operator in question was an employee of Petitioner at the time of the accident, and therefore the petition fails to show substantial grounds for the granting of the writ, particularly as two courts below have decided this question against Petitioner.

2.

The decision of the Circuit Court of Appeals in holding, as a matter of law, that the crane operator was an employee of Petitioner, did not fail to follow the decision of the highest appropriate state court, but did follow it, and consequently the petition should be denied.

3.

The decision of the Circuit Court of Appeals in holding that the crane operator was an employee of Petitioner is not in conflict with, but follows the rule announced by the Supreme court of Texas in the case of SMITH BROS., INC., v. O'BRYAN, 127 Texas 439, 94 S.W. (2d) 145.

4.

The evidence undisputably showing that the crane operator was doing the work of Petitioner and Petitioner was exercising and had the right of control of the crane operator, not only as to the work to be done, but as well as to the details of the means of its accomplishment, the Circuit Court of Appeals correctly decided, under the latest holdings of the highest court of Texas, that the crane operator was an employee of Petitioner.

SUMMARY OF FACTS, AUTHORITIES AND ARGUMENT UNDER RESPONDENT'S POINTS NOS. 1 TO 4, INCLUSIVE

Summary of Facts

The Circuit Court of Appeals opinion, with nothing therein to the contrary, states:

> "On April 27, 1936, the Southern Steamship Company, under its tariff arrangement with the Navigation District, took over the dock, the crane shed, the mechanical equipment, and the overhead crane and its operator. The crane operator while working for Southern Steamship Company was *under its direct supervision and control* (italics briefers). He was directed by agents and servants of the Steamship Company when to commence work, when to work overtime, and when to quit work. Furthermore he was paid for his services by the Steamship Company through the Navigation District."
>
> * * *
>
> " * * * Item 810 of the tariff agreement in effect on the day of the accident is as follows:
>
> " 'Responsibility for Damages. Charge for operators of freight handling machinery will be made by the Port Commission, but it is expressly understood that the Port Commission acts solely as the agent of the user in engaging operators and paying them for their services. The operator as well as the freight handling machinery *is turned over to user and is under user's supervision and control; and user accepts sole responsibility and liability for any damage or injury to persons or property occasioned by the use and operation of such machinery,* including damage to the property of the Port Commission *and/or injury to its employees.*' " (Italics briefer's.)
>
> "This tariff agreement is relevant and, when considered and weighed with all the evidence in the record, shows without dispute that the operator of the crane was working for the Southern Steamship Company at the time of

the accident. The ruling of the court in this regard was free from error" (R. 593; see also R. 280 where item 810 appears, R. 277 where stipulation of counsel containing tariff was offered).

The tariff provides that use of the facilities shall constitute a consent to the terms and conditions of the tariff (R. p. 277, offered and appears).

Petitioner, defendant in the trial court, alleged:

> "* * * Southern Steamship Company admits that on April 27, 1936, it was using Dock No. 4 in accordance with the applicable tariffs of the Port Commission * * *" (R. 36).

Mr. Archer, the accountant for the District, without contradiction, testified that appellant exclusively used the west end of Dock No. 4 (the part where the shed and crane in question were) and had done so since 1925 (R. 249, 283-284), and during all that time it was only vacant a week or two (R. 292); that there were other Navigation District hoists available (R. 292, 469), though this was the only electric crane the District had (R. 292) and this electric crane could not have been made available for others without permission of the Steamship Company, after a time and after changing the electric switch (R. 292-293); that the electric meter for this crane was that of the Steamship Company (R. 293); that Southern Steamship Company also used the other part of the wharf, but no one else used this part of the wharf except Southern Steamship Company (R. 295); that there were other terminals, private ones, besides that of the Navigation District (R. 471).

The Petitioner told the operator when to go to work (R. 460) and when to quit (R. 460) and when to work overtime (R. 461). The Navigation District gave him no instructions as to what to do with the loads (R. 412). The operator received no instructions from the Navigation District or its rep-

resentative while doing the work of the Steamship Company (R. 506-507, 514) or when to go to work (R. 514). Its representative knew nothing of the freight (R. 507). The Navigation District wanted to use other operators but was told by appellant's superintendent that the others could not move the freight fast enough and that he, the appellant's superintendent, would have to keep Leonard (the operator), and as a result he was kept. If the Steamship Company had called the Navigation District's representative and insisted upon selecting their own operator, that they could have done so (R. 523). The Navigation District had for years attempted to put in an auxiliary operator on the crane for relief purposes, but this had been objected to and prevented by appellant (R. 523).

A. G. Eggling testified, without contradiction, that he was the superintendent for appellant in charge of moving the steel for the Steamship Company (R. 434); that the operator was doing the work of and for appellant (R. 453); that so far as time was concerned the operator was under his orders (R. 453); that he, Eggling, would tell the operator when to go to work (R. 452); that he, Eggling, had under him as his immediate "straw boss" Robert Culpepper, and under Robert Culpepper were sub-bosses Joe Thomas and another man; that the rest of the gang was "Frenchy" or Mouton, Victor, White and Feast (R. 434); that the operator was under his, the witness' orders as to where to pick up a particular piece of freight, iron or steel, or whatever it might be (R. 453); that Eggling's men would tell him this by signal (R. 453); that Eggling's men would tell him where to deposit it (R. 453); whether to put in a gondola car or box car, or wherever he, Eggling, was putting it (R. 453); that from the time that the operator got into the crane and started it in operation until he quit, he was doing that work for Petitioner (R. 453); that it was Eggling's job to order the cars according to routing and so forth, and to see that the cars got into the right railroad service car "and so

on;" that he, Eggling, would go out on the car and pick one out and "I would tell Joe Thomas the b(l)ack car of pipe coming out of No. 4 hatch is going to track No. 3 or track No. 4, or whatever it might be (R. 436); that the respective pieces of pipe were marked to indicate what hatch it came from (R. 436); that after he, Eggling, told Joe Thomas that the pipe out of No. 4 Hatch is going to Track No. 3, he, Thomas, watched and saw that such pipe went to such place; that the Navigation District did not have any man down there to tell the Steamship's gang where to place the freight on the wharf apron (R. 462); *that the Southern Steamship Company had its entire force from the superintendent all the way down to the longshoremen, and Eggling controlled every step in that operation, from unloading the freight from the boats, placing it on the wharf, deciding what went into the warehouse and what went into the cars—that was all his business and the Navigation District had nothing to do with it* (R. 462); *that whether the freight from Hatch No. 1 was placed in the front of the dock or at the back of the dock, or in the center of the dock was a matter for Eggling to decide, and that Billy Leonard (the operator) had nothing to do with that; that he didn't know what hatch it came from, didn't spot the freight on the wharf, had nothing to do with ordering the freight cars, did not "until we told him" know what freight went into each car, nor the destination of the cars, or whether it belonged to one owner or whether it went all over the southwest to a dozen* (R. 462); *but the operator picked up the freight where the appellant's men indicated and put it into the car where appellant's other men told him; and if appellant's men wanted it in the front of the car or in the center or in the back of the car or on the right-hand side of the car or on the left-hand side of the car, appellant's men told him, in other words, the operator took the freight and handled it exactly as appellant told him to handle it* (R. 463).

Joe Thomas, one of the sub-bosses, testified that when the pipe came off the boat it is put in different piles where there are places for it, and that he indicates to the operator which load of freight is to be picked up by going over and standing by it (R. 350). Thomas further testified that the foreman told him to go to a particular load which is a signal to the operator to pick that up next, and that he, Thomas, then held up his hand to indicate which car the operator should take it to, that the operator could see the signal and that when he wanted it put down at any particular spot, he would walk over and stop at the place where he wanted it put down (R. 351); that he also signaled the crane operator as to when the other man, that is, his immediate helper, had finished his work; that this signal consisted in standing back from the load and that this is a signal to pick it up; and that as long as he stands there that that is a signal not to pick it up (R. 365).

Joe Thomas further testified that Robert Culpepper was the negro boss out there (R. top 354); that Robert Culpepper was his foreman (R. 348); that the foreman told him where to work (R. 348), and where the freight was to go (R. 348); that he, Thomas, was head man of the entire hookup gang (R. 349, 355); that there was freight all around and he would, as head man, indicate what pipes should be taken (R. 348-349, 351); that he would give a signal indicating where the particular loads were to go (R. 348). He further testified that he was the "out-side man" (R. 325) of the two men working for appellant who hooked up to the crane (R. 322); that it was his job to indicate to the crane operator the load to be picked up (R. 324); that he signaled the operator which load was to be picked up by walking over and standing by the pile he wanted picked up (R. 325); that it was his job to direct which railroad car the pipe should be loaded in (R. 329); that he gave the directions as to what car the pipes should be loaded in by holding up his fingers, that is, a different number of

fingers for the different tracks, the tracks having different numbers and there being a car on each track (R. 329). He testified, in effect, that this was to direct the crane operator (R. 329). He also testified that these directions were for the men in the cars so that the pipe could be put in the proper car as he had been instructed by his superior, the checker (R. 335).

Similarly the witness, J. B. Mouton, who was the sub-boss or "outside end man" at the railroad tracks testified as to his minutely controlling the acts of the operator in order to carry out the wishes and instructions of Mr. Eggling, passed down to him through Robert Culpepper and Joe Thomas. His testimony appearing in the Record on pages 360, 361, 362, last six lines on page 367, pages 368, 369, first thirteen lines on page 370, last ten lines on page 374, all of page 375 except the last six lines, last seven lines on page 376 and the first half of page 377 is hereby referred to, incorporated herein and made a part hereof.

The witnesses Edwin White, Phil Culpepper, E. L. Victor and Israel Feast testified substantially to the same effect (R. 379, 393, 410).

In this connection, Isreal Feast testified that the direction of the work even went so far as to having the operator of the crane deposit the pipe in the particular side of the car to which he wanted it placed, that he did this by indicating with his hand (R. 420).

It was testified, without contradiction, that the men on the ground did at times give the crane operator "slow signals" to slow him down (R. 149).

The statement under "Statement of the Case" above is hereby referred to and adopted as part hereof.

Argument

We agree that the law of Texas governs. Hence no discus-

sion is necessary of the ERIE R. R. Co. v. TOMPKINS case and others cited on the same point by Petitioner.

It is axiomatic that a writ of certiorari will not be granted by this court, if the Circuit Court of Appeals has followed the applicable state decisions.

It is equally as axiomatic that the burden is on Petitioner to show a conflict with the applicable state decisions; that a conflict will not be presumed. The presumption, of course, is that the Circuit Court of Appeals did follow the correct rule of decision, unless the contrary is shown (BAGNELL v. BRODERICK, (U. S. Sup.) 38 Peters 434, 10 L. Ed. 235). The bare statement by Petitioner that the Circuit Court of Appeals failed to follow the Texas rule is not sufficient. That is all that Petitioner has here. There is nothing in the record to indicate that the Circuit Court of Appeals did otherwise than follow it. The record shows that the Circuit Court of Appeals attempted to follow and did follow the rule of Texas as announced by the latest decision of its highest appellate court. Petitioner's true position, though not expressed, is that it seeks to get this Court to analyze the evidence to see if the Circuit Court of Appeals did not wrongfully decide the sufficiency of the evidence. If such analysis were made, it would show the Circuit Court of Appeals correct. However, this is not a "substantial ground" for the granting of a writ, under the decisions of this court. (MR. CHIEF JUSTICE HUGHES at the Amer. Law Ins. Meeting, 20 Amer. Bar. Ass'n. Jnl., 341, June, 1934.) This Court will not grant certiorari "to review evidence and discuss specific facts" (UNITED STATES v. JOHNSTON, 268 U.S. 220, 69 L. Ed. 925; SOUTHERN POWER CO. v. NORTH CAROLINA PUBLIC SERVICE CO., 263 U.S. 508, 68 L. Ed. 413). Neither will the writ be granted merely to give the defeated party another hearing based upon an appreciation of the factual record (UNITED STATES v. MCGOWAN, 290 U.S. 592; 78 L. Ed. 522).

The writ will not be granted to review sufficiency of the evidence (HOUSTON OIL COMPANY OF TEXAS v. CORNELIA G. GOODRICH, 245 U.S. 440; 62 L. Ed. 385; SOUTHERN POWER COMPANY v. NORTH CAROLINA PUBLIC SERVICE COMPANY, 263 U.S. 508, 68 L. Ed. 413. Particularly is this true where two lower courts must have already concurred in the fact findings. The substitution of the discretionary for the obligatory jurisdiction of the Supreme Court has not changed this principle. (HOUSTON OIL COMPANY v. GOODRICH, 245 U.S. 440.)

Petitioner says that the correct rule is announced in the case of SMITH BROS., INC., v. O'BRYAN, 94 S.W. (2d) 145, 127 Tex. 439, by the Supreme Court of Texas. This is not the latest decision, but the rule of this case is, in our opinion, correct. The Respondent took this position in the Circuit Court of Appeals citing the O'BRYAN case and other cases on same point cited by Petitioner (R. 628-d, 628-c). We there stated and repeat here, as still applicable, the following:

"We do not differ with the law as actually announced in the case of SMITH BROS. v. O'BRYAN, 94 S.W. (2d) 145; DAVE LEHR, INC., v. BROWN, 91 S.W. (2d) 693; SOUTHERN SURETY CO. v. SCHOEMAKE, 24 S.W. (2d) 7; SHANNON v. WESTERN INDEMNITY COMPANY, 257 S.W. 522. The appellant has simply misapplied the holdings of these cases. As a matter of fact, these cases uphold the contention of appellees, and we cite them as authorities supporting the judgment of this court herein. Writer is very familiar with the O'BRYAN case, having participated in the argument on the hearing to which that case was decided by the Commission of Appeals of the State of Texas. The O'BRYAN case and the case of RIGGS v. HADEN CO., 94 S.W. (2d) 152, were submitted and argued together. The facts are not greatly dissimilar in these two cases. Writer tried the RIGGS v. HADEN case in the trial court and briefed it in both the Court of Civil Appeals and the Supreme Court of

Texas, although, through a misprint, his name does not appear as one of the attorneys. The facts in that class of cases, which includes the O'BRYAN case, DAVE LEHR case and RIGGS case, all have to do with hauling by truck owners or their drivers. The court, in effect, simply held that, where a dealer in shell, gravel and sand or such like substance does not deliver his own product from his plant, or from the place that he has his product, to the purchaser or point of delivery, but employs a truck owner for this purpose who has the right to employ, pay, control and discharge, and does employ, pay, control and discharge his truck drivers, the truck owner's control extending to the manner and details of the means of the work to be done, and the sand and shell dealer having no interest in the matter except to pay for the delivery, upon ascertaining that it was actually made, the truck owner is an independent contractor and his truck drivers are his employees and not those of the dealer. The test as laid down in these cases and which we adopt as stating the rule that we rely upon is, the right of control. These cases were decided on the theory that the truck owner did have and exercised the right of control of the driver and was, therefore, the employer of the driver. *We wish to make it clear that we rely upon the authority of these cases to support our position that the operator of the crane in the instant case was an employee of the Steamship Company at the time of the accident in question* (italics in this brief). The SHANNON v. WESTERN INDEMNITY CO. case, cited by appellant, also sustains our position. In the latter case, the courts held that where the owner and operator of a floor surfacing machine, who had no agreement as to how the work should be done, and where no one exercised any control or direction over him as to the means or methods or manner of doing the work, and where the person for whom the work was being done had no control over the work or the method of doing same, except to accept or reject it when completed, and where the owner of the machine

had the right to employ and discharge his own help, if necessary; such owner and operator of the machine was an independent contractor."

"From all the Texas authorities, it is clear that the test, whether considering the case of an independent contractor or that of a loaned employee is, who has the right of control. As applied to the instant case, the question is whether the Navigation District reserved the right to control and direct the crane operator as to the work being done for the Steamship Company not only as to what should be done and how it should be done but as well to the details of the means of its accomplishment. Without question whatsoever in our minds, no such control was reserved by the Navigation District and the crane operator was employed by the Steamship Company. The latter controlled not only what should be done and how it should be done but also the details of the means of its accomplishment, which it had a perfect right to do under the tariff and also under the work as actually carried out and assented to by the crane operator."

"We again refer to Item 810 of the Tariff (R. 280).

"The case of KING v. GALLOWAY, 284 S.W. 942 (Com. of Appeals, opinion adopted by the Supreme Court of Texas), quotes with approval the following definition of employee:

> "'No better test can be applied than to say that the relation of master and servant exists where the master retains or exercises the power of control in directing, not only the end sought to be accomplished by the employment of another, but as well the means and details of its accomplishment; "not only what shall be done, but how it shall be done."'

"It means the same, but the definition would perhaps be a little clearer if transposed slightly to put the general clause first, as follows:

> " 'No better test can be applied than to say that the relation of master and servant exists where the master retains or exercises the power of control in directing "not only what shall be done, but how it shall be done;" not merely the end sought to be accomplished by the employment of another, but as well, the means and details of its accomplishment."

"In the case of SOUTHERN SURETY v. SCHOEMAKE, 24 S.W. (2d) 7 (Com. of App. of Texas), the definition from KING v. GALLOWAY is approved and the court further quoted from the SHANNON case:

> " ' * * * When one is employed by another, it may be generally said to be in the relation of servant to master, or as independent contractor. This being true, the courts in nearly every instance have undertaken to determine the relation of the person employed by another by first deciding whether or not such person was an independent contractor. If he was found not to be such under all of the facts and circumstances, then he was classed as a servant or employee.'

"In the instant case, neither the Navigation District nor the crane operator were independent contractors. The Navigation District only rented the crane to appellant. The operator, without question, was doing the work of appellant. There was no contract whereby the operator agreed to accomplish a certain result. He willfully surrendered and was surrendered to the control of the Steamship Company not only as to the result to be accomplished but as to the 'means and details of its accomplishment.'

"The authorities cited by appellant are not different from this, unless the finding for the plaintiff or the defendant makes a case a different authority, as distinguished from the laying down of a certain rule of law and following it.

"We respectfully submit that under the authorities as cited

by both appellant and appellee, the operator was an employee of appellant * * * ."

The Circuit Court of Appeals in its opinion (R. 593) cited nothing but Texas cases as upholding its conclusion that the evidence, upon analysis, showed the crane operator to be an employee of Petitioner. The two cases cited by the Circuit Court of Appeals were LIBERTY MUTUAL INSURANCE COMPANY v. BOGGS, 66 S.W. (2d) 787 (w. of e. dismissed by Supreme Court of Texas), decided before the O'BRYAN case and OCHOA v. WINERICH MOTOR SALES COMPANY, 94 S.W. (2d) 416, decided by the Supreme Court of Texas fourteen days after it decided the O'BRYAN case. The OCHOA case cites the O'BRYAN case twice with approval. At one place, the opinion (bottom first column, page 419 of 92 S.W. (2d), states:

> " * * * it is stated in the note in 75 A.L.R. 726 that 'the modern cases look to the broader question whether the person is in fact independent or subject to the control of him for whom the work is done.' This is true of the recent decisions in this State, particularly of Smith Bros., Inc., v. O'Bryan, supra.
>
> "Application of the test of *control, or right of control* (italics briefers) to the facts with respect to the employment of Salinas in the performance of which plaintiff in error was injured makes him an employee or servant rather than an independent contractor."

We fail to see how it can be claimed that the Circuit Court of Appeals did not follow the O'BRYAN case. It did not specifically cite it, but the rule of this Court is not that a writ will be granted if the lower court fails to specifically cite some case. It is not necessary to specifically cite any case, but the Circuit Court of Appeals did cite the two cases mentioned which apply the same rule as announced in the O'BRYAN case. The Texas Supreme Court case cited by the Circuit Court of Appeals was later than the O'BRYAN case. Perhaps this is why the court

cited it rather than the O'BRYAN case. The case cited has never been overruled, and is the law in Texas today.

Petitioner in its brief, says that the STANDARD OIL COMPANY v. ANDERSON case and the O'BRYAN case were not followed. Let us examine the decisions in question:

STANDARD OIL COMPANY v. ANDERSON, 212 U.S. 215:

> In this case, the injured plaintiff was employed to load the ship of defendant by Torrence, a stevedore who was under contract to load the ship. All of the workmen except the winchman were in the general employ of the stevedore. The defendant was paid by the stevedore $1.50 per thousand for hoisting. The stevedore had no control over the movements and conduct of the winchman except as follows: The hours of labor of the winchman necessarily conformed to the hours of the longshoremen; the winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil and the winchman necessarily depended upon signals from others; these signals were given by an employee of the stevedore called a gangman, who stood upon the deck and gave signals to hoist or lower by the blowing of a whistle which could be heard from a long distance. The negligence consisted in lowering a draft of cases before receiving the signal.
>
> It was claimed by the defendant that the winchman, though in its general employ, had ceased to be a servant and had become, for the time being, the servant of the master stevedore. The court stated that this might have been true although the winchman was selected, employed, paid and could be discharged by defendant. The court then states that the question turns upon whose servant the winchman was, that the test is, whose work he was doing and under whose control he was doing the work. The court states that one may use the workmen of another in two ways; that if the other furnishes him with men to do the work and places them *under his exclusive control* in the performance of it, these men be-

come the servant of him to whom they are furnished, but that one may prefer to enter into an agreement with another that such other, for a consideration, shall himself perform the work through servants of his own selection, *retaining the direction and control.* The court states that in the first instance, he to whom the workmen is furnished is responsible for his negligence in the conduct of the work because the work is his and the workmen are for the time his workmen; that in the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it because; though it is done for the ultimate benefit of the other, it is still in its doing his own work. The court states "to determine whether a given case falls within the one class or the other we must inquire whose is the work being performed,—a question which is usually answered by ascertaining *who has the power to control and direct the servants* in the performance of the work (italics briefers). It is here the court then states that it must carefully distinguish between authoritative direction and control and mere suggestion to the necessary coöperation where the work furnished is part of a larger undertaking. There is nothing to indicate that the court means to say other than that the right of control governs.

The right of Control is made the test in this case.

SMITH BROS., INC., v. O'BRYAN (Com. App., Tex.), 94 S.W. (2d) 145:

In this case, plaintiff was damaged by a truck driven by the owner, one Henson. It was sought to hold the defendant liable for his negligence. Smith Bros. were general contractors and needed to haye materials, sand and gravel, moved from their plant to where the work was being done. They owned no trucks but paid the drivers and owners of the trucks, or the owners, if the trucks were not owned by the driver, so much per load depending on the distance hauled. The truckers came and went as they pleased and over what route they pleased. The only control by Smith Bros. was that they required

the material hauled, if the trucker desired to haul it, to where defendant wanted it and required that a receipt of defendant's boss on the job be returned to show delivery for payment to be made. The court held the trucker an independent contractor. The case cites with approval the Standard Oil Company case v. Anderson, supra, as well as the case of Shannon v. Western Indemnity Co. (Tex. Com. App.), 257 S.W. 522, wherein it is stated: "no better test can be applied than to say that the relation of master and servant exists where the master *retains or exercises the power of control* in directing, not merely the end sought to be accomplished by the employment of another, but as well the means and details of its accomplishment, 'not only what shall be done, but how it shall be done.' "

The right of control is made the test in this case.

LIBERTY MUTUAL INSURANCE COMPANY v. BOGGS (Tex. Civ. App.), 66 S.W. (2d) 787, w. of e. dismissed by Supreme Court.

In this case the question was as to whether an aviator, a skilled operator, was an employee of Curtis-Wright Flying Service. The court held that he was under such company's control and an employee. The opinion, just as did the Smith Bros v. O'Bryan case, cited with approval the case of Shannon v. Western Indemnity Company, 257 S.W. 522, referring to it as a well considered opinion. The court states the test is right of control. Further it states:

"If conclusive proof of the right of control be decisive—a proposition which we take to be established—then it necessarily follows that, where the contract is in writing, and in evidence, or where, if not in writing, its provisions are admitted or established conclusively by the testimony, and where, in either such case, the contract, by express provisions or necessary implication, shows who has the right of control, no question of fact arises."

The right of control is made the test in this case.

OCHOA v. WINERICH MOTOR SALES CO., 94 S.W. (2d) 416 (Com. App., Tex.), opinion adopted by the Supreme Court:

> In this case the question was whether an automobile mechanic whose negligence caused plaintiff's injuries was an employee of defendant. This is the Supreme Court opinion expressly cited by the Court of Civil Appeals in the instant case. The Shannon v. Western Indemnity case, approved in the O'Bryan case, is cited with approval, as well it might, because the Ochoa case was decided only 14 days after the same court decided the O'Bryan case. The opinion states: "Application of the test of control or right of control, to the facts with respect to the employment of Salinas in the performance of which plaintiff in error was injured, makes him an employee or servant rather than an independent contractor.
>
> "* * * It is true that Salinas had a distinct occupation, that of automobile mechanic, and that the act which he was directed to perform involved the exercising of a certain amount of mechanical skill, but these facts do not release him from the control reserved and exercised by his employer. Domestic servants, such as cooks, gardeners, and chauffers, have independent occupations, and in the performance of their work they exercise skill and judgment, but they are not independent contractors. 14 R.C.L., pp. 75-76 §12; note, 19 A.L.R. 245 and cases there cited. The fact that one has a distinct occupation or calling or that he is given employment by reason of his special skill does not fix his status as an independent contractor rather than an employee or servant in a particular employment. Even though he may have peculiar skill and may have been employed because of such skill, he is still an employee or servant, if the employer retains the right to control the work."
>
> The case not only cites the O'Bryan case, but the King v. Galloway case mentioned, showing that the court recognizes them as applying the same rule.

The right of control is made the test in this case.

This rule has been applied elsewhere to facts like those in the instant case:

DONOVAN v. LAING (1893—1 Q.B. 625):

> Suit for damages for injuries caused by the negligence of a workman operating a crane which was loading a ship from a quay. The defendants owned the crane, which they loaned, with the man in charge of it, to Jones & Co., the firm engaged in loading the ship.
>
> Opinion by Lord Esher, M. R.: The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are fastened to the chain and raised, and then the arm of the crane is swung around, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends on what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading. In this case the crane and the man to work it were lent by the defendants to Jones & Co., for a consideration, and to be used in the manner I have described. For some purposes no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect and in consequence any one was injured thereby, the defendants might be liable; but the accident in the case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was a servant of the defendants. So, indeed, he was as to a great many things, but as to the working of the crane he was no longer their servant but bound to work under the orders

of Jones & Co., and, if they saw the man misconducting himself in working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority; but there is authority for it without going back to an earlier date, in the case of Rourke v. White Moss Colliery Co. (2 C.P.D. 268). There, one of the questions was, whose servant a man called Lawrence was. He was the general servant of the defendant but he was hired out to another person, and so far as concerned the operation which he performed for that person, and in which he was negligent, he was held not to be the servant of the defendants.

Opinion by Cockburn, C. J.: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal, just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

Nothing can be clearer than that. The man was the servant of the defendants; but he was lent to Whittle, and was negligent in the operation in which Whittle employed him, and he was held, so far as that operation was concerned, to be in the employment of Whittle, *who had the control of the matter on which he was engaged, over which his general master had no control* (italics briefers). The passage referred to from the judgment of Lord Watson in Johnson v. Lindsay & Co. (1891, A.C. 371), seems to me to be exactly to the same effect. I only notice the case of Jones v. Mayor of Liverpool (14 Q.B.D. 890) because Grove, J., seems to have thought there was a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously. It seems to me impossible to say that the consideration has anything to do with the principle on which the servant must be held to be in the employ of one or the other.

In the present case, so far as the working of the crane went and so long as he was working it, the man in charge was the servant of Jones & Co., and was not the servant of the defendants.

The appeal must be dismissed.

Opinion by Bowen, L. J.: The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act; but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, *that by the employer is meant the person who has a right at the moment to control the doing of the act* (italics briefers). That was the test laid down by Crompton, J., nearly forty years ago, in Sadler v. Henlock (4 E. & B. 570), in the form of the question, "Did the defendants retain the power of controlling the work?" Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed, the means of arriving at it may be left to him or he may contract in a different manner, and not doing the work himself may place his servant and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do. The case is on the same lines as Rourke v. White Moss Colliery Co., supra, and Lord Watson's decision in Johnson v. Lindsay & Co., supra, does not differ from the view taken of the law in the other case. The principal part of the argument for the plaintiff was founded on what may be called the carriage cases, Laugher v. Pointer (5 B. & Co. 547), and Quarman v. Burnett (6 M. & W. 499), but they really have nothing to do with the point presented

in this appeal. If a man lets out a carriage, on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time. I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have cased my judgment.

But in The Elton (1906), 73 C.C.A. 467, 142 Fed. 367, reversing (1904; D.C.) 131 Fed. 562, the court was of the opinion that the ship was not responsible for the acts of negligence of a winchman in its employment, where the vessel was at the time being unloaded by stevedores under a contract with the charter or consignee, who, by the terms of the charter party, was entitled to have the ship furnish the use of its winches and a man to operate them; the captain and the mate having testified that the officers of the ship had no direction or control of the winchman in his actual work of unloading, and that he could have at any time been removed from the work and another put in his place by the stevedore. The point was merely argumentative in this case, and as tending to support the court's view that the libellant's pleading was proceeded upon the theory that the ship had furnished an incompetent and inexperienced person to operate the winch.

The opinion then discusses the cases of Diehl v. Robinson (1902), 72 App. Div. 19, 76 N.Y. Supp. 252, and Higgins v. Western U. Teleg. Co. (1898), 156 N.Y. 75,

66 Am. St. Rep. 573, 50 N.E. 500, 4 Am. Neg. Rep. 320 (reversing [1895] 11 Misc. 32, 31 N.Y. Supp. 841).

The right of control is made the test in this case.

From the above, it seems clear to us that the Circuit Court of Appeals attempted to follow the rule of all the cases above mentioned. There is only one rule, and that is common to all the cases cited and the decision of the Circuit Court of Appeals in the instant case. It is that the test is the right of control.

The facts set out above under the "Summary of the Evidence" show conclusively that the work of the Petitioner was being done, that it had the right of control and exercised it. This is what the trial court and the Circuit Court of Appeals found. Under no possible theory could the Navigation District be held an independent contractor. The facts do not show that Leonard, the crane operator, was an independent contractor. He had no independent undertaking. Every detail of the work was controlled and supervised by Petitioner. Petitioner, actually and practically controlled all of the material details of his work and how he should do it. It is no answer that he was a skilled operator as shown by the cases cited.

Petitioner seeks to get this Court to again review the evidence, pass upon its weight and give it another trial on the sufficiency of the evidence. This is not "substantial grounds," and if it were, the record shows it was correctly resolved against Petitioner.

Conclusion

WHEREFORE, Respondent respectfully submits that the Circuit Court of Appeals did follow the law as decided by the highest appropriate state court in deciding the crane operator was the employee of Petitioner because it had and exercised the power of control over him; and Respondent prays that the Petition for Writ of Certiorari be in all things denied, and

for costs of suit and such other action of this Court as may be right and proper in the premises.

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By .....

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Receipt and service of three copies of the foregoing brief are hereby acknowledged this .....day of August, 1940, and any further notice of filing of same and service of copies is hereby waived.

.....

Attorneys for Petitioner,
SOUTHERN STEAMSHIP COMPANY